NISGA'A NATION

Review of the Federal Moratorium on Oil and Gas Activities

Offshore British Columbia

Nisga'a Lisims Government

Submission to the Minister of Natural Resources

September 13, 2004

A. Introduction

Nisga'a Lisims Government welcomes this opportunity to provide the Nisga'a Nation's position in respect of the federal government's consideration of potential exploration and development of offshore oil and gas resources in or adjacent to the Nass Area directly to the Minister of Natural Resources, in accordance with his invitation of April 1, 2004.

We understand that this submission will be considered by the Minister and by Cabinet in addition to and separate from the reports of the Royal Society of Canada, the Priddle Panel and the First Nations Engagement Coordinator, and that it will inform any subsequent decision by Canada on whether to lift the offshore oil and gas moratorium. The Nisga'a Nation's position on the review process generally has been provided to the Minister under separate cover.

Our submission describes the issues and concerns unique to the Nisga'a Nation in respect of potential future exploration and development of offshore oil and gas resources in British Columbia. It also outlines our expectations as to the role the Nisga'a Nation should have in the ongoing consideration of potential future offshore oil and gas resource development in British Columbia.

B. The Nisga'a Final Agreement

The Nisga'a Final Agreement (also known as the Nisga'a Treaty) between the Nisga'a Nation, Her Majesty in right of Canada, and Her Majesty in right of British Columbia came into force on May 11, 2000. It is a treaty and a land claims agreement within the meaning of s. 25 and s. 35 of the *Constitution Act, 1982*. The Nisga'a Nation's rights under the Treaty are constitutionally recognized and affirmed. Our Treaty is binding on the federal and provincial Crowns and its provisions have the force of law.

The Nisga'a Treaty, among other things, established Nisga'a Lands, the Nass Area and the Nass Wildlife Area. The Nisga'a Nation owns Nisga'a Lands in fee simple, including all mineral and geothermal resources.

The Nisga'a Treaty also sets out the rights of the Nisga'a Nation in respect of environmental assessment, particularly if our people, our lands or our interests may be reasonably expected to be adversely affected. An "environmental assessment" is defined in the *Definitions* Chapter of the Nisga'a Treaty as "the evaluation of impacts on the environment, and includes screening, study, and review."

Paragraph 6 of the *Environmental Assessment and Protection* Chapter of the Treaty sets out Canada and British Columbia's obligations in respect of a proposed project located off Nisga'a Lands:

> 6. If a proposed project that will be located off Nisga'a Lands may reasonably be expected to have adverse environmental effects on residents of Nisga'a Lands, Nisga'a Lands or Nisga'a interests set out in this Agreement, Canada or British Columbia, or both, as the case may be, will ensure that the Nisga'a Nation:
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> a. receives timely notice of, and relevant available information on, the project and the potential adverse environmental effects;
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> b. is consulted regarding the environmental effects of the project; and
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> c. receives an opportunity to participate in any environmental assessment under federal or provincial laws related to those effects, in accordance with those laws, if there may be significant adverse environmental effects.

A "project" means "any undertaking or proposed undertaking in relation to a physical work or activity" (see *Definitions* Chapter).

Canada must, under paragraph 6(b) of the *Environmental Assessment and Protection* Chapter, in respect of a proposed project, "ensure that the Nisga'a Nation is consulted

regarding the environmental effects of the project." "Consultation" is defined (in the *Definitions* Chapter) as the provision to a party of:

a. notice of a matter to be decided, in sufficient detail to permit the party to prepare its views on the matter,

b. in consultations between the Parties to this Agreement, if requested by a Party, sufficient information in respect of the matter to permit the Party to prepare its views on the matter,

c. a reasonable period of time to permit the party to prepare its views on the matter,

d. an opportunity for the party to present its views on the matter, and

e. a full and fair consideration of any views on the matter so presented by the party.

The *Environmental Assessment and Protection* Chapter further provides:

7. If Canada or British Columbia establishes a board, panel, or tribunal to provide advice or make recommendations with respect to the environmental effects of a project on Nisga'a Lands or a project off Nisga'a Lands that may reasonably be expected to have adverse environmental effects on residents of Nisga'a Lands, Nisga'a Lands, or Nisga'a interests set out in this Agreement, the Nisga'a Nation will:

a. have standing before the board, panel, or tribunal; and

b. be entitled to nominate a member of the assessment board, panel, or tribunal, unless the board, panel, or tribunal is a decision-making body, such as the National Energy Board.

8. All environmental assessment processes referred to in this Agreement will, in addition to the requirements of applicable environmental assessment legislation:

a. coordinate to the extent possible the environmental assessment requirements placed by the Parties upon a project proponent;

b. require the project proponent to provide information or studies, as appropriate, about the project and its potential environmental effects and the measures that can be taken to prevent or mitigate those effects;

c. ensure that all information relevant to the assessment of the project is available to the public, other than information that is required to be kept confidential under applicable law;

d. provide for public participation in the assessment process, including public notice of the project, an opportunity to make submissions, and, when deemed appropriate by the Party conducting the assessment, public hearings conducted by an independent review panel;

e. assess whether the project can reasonably be expected to have adverse environmental effects on residents of Nisga'a Lands, Nisga'a Lands, or Nisga'a interests set out in this Agreement and, where appropriate, make recommendations to prevent or mitigate those effects;

f. assess the effects of the project on the existing and future economic, social and cultural well-being of Nisga'a citizens who may be affected by the project;

g. set out time periods within which the assessor must make its recommendation in respect of whether or not the project should proceed;

h. provide for recommendations, based on the assessment, to the Party or Parties with decision-making authority over the project, in respect of whether the project should proceed;

i. take into account any agreements between the project proponent and the Nisga'a Nation or a Nisga'a Village concerning the effects of the project; and

j. be conducted and completed by a Party before that Party issues final approval.

The *General Provisions* Chapter, paragraph 58(a) provides for the timely fulfillment of obligations as follows:

58. In this Agreement:

a. the use of the word "will" denotes an obligation that, unless this Agreement provides to the contrary, must be carried out as soon as practicable after the effective date or the event that gives rise to the obligation.

We understand that it remains the intention of the Government of Canada to comply with all provisions of the Nisga'a Treaty in its ongoing consideration of future offshore oil and gas development, and in particular, in the process leading to a final decision on whether to lift the moratorium.

The Nisga'a Lisims Government's submissions are informed by and consistent with the Nisga'a Nation's rights under the Nisga'a Treaty as well as the government to government relationship reflected in the Treaty.

C. The Nisga'a Nation's Position on Offshore Oil and Gas Development

In 1985, when the prospect of lifting the moratorium on offshore oil and gas development was under review by the federal and provincial governments, Nisga'a Lisims Government's predecessor, the Nisga'a Tribal Council, participated before and made submissions to the West Coast Offshore Exploration Environmental Assessment Panel. The Nisga'a Tribal Council's position was that before the moratorium could be lifted:

1. there must be proper resolution of the Nisga'a land question;
2. proper environmental assessments must be established and carried out to ensure that any offshore oil and gas activities can take place in an environmentally safe manner having regard to the combined cumulative impacts of those activities and any developer must be required to post a bond sufficient to protect adjacent communities in the event of environmental degradation or catastrophe; and
3. means must be found whereby the Nisga'a Nation will share in the benefits of any such activities.

The first matter, has, of course, been resolved by the Nisga'a Treaty.

The other matters have not yet been properly addressed. In our view, they, along with other matters raised in this submission must now be addressed as part of the federal government's ongoing review process and in accordance with the Nisga'a Treaty.

The objectives of the Nisga'a Nation with respect to offshore oil and gas development are straightforward:

- the Nisga'a Final Agreement must be complied with;
- any potential future exploration and development of offshore oil and gas must be undertaken in an environmentally safe and scientifically sound manner;
- the Nisga'a Nation must participate in a meaningful way in the development of an appropriate fiscal and regulatory framework for any future offshore oil and gas activities;
- all proper assessments must be undertaken on the potential impacts of offshore oil and gas exploration and development on the environment, on the future economic, social and cultural well being of Nisga'a citizens, and on the measures that can be taken to prevent or mitigate potential adverse impacts;
- the Nisga'a Nation must have a meaningful role in such assessments;
- appropriate safeguards must be established to protect the Nass Area in the event of environmental degradation or catastrophe;
- the Nisga'a Nation must share in any economic benefits arising from any future offshore oil and gas activities that could affect our interests; and
- all information relevant to any potential future exploration and development of offshore oil and gas must be effectively communicated to Nisga'a citizens.

Achieving these objectives will require meaningful participation by the Nisga'a Nation in the consideration of each of the following areas:

1. development of regulatory processes and resolution of jurisdictional issues;
2. environmental considerations; and
3. socio-economic issues.

1. Development of Regulatory Processes and Resolution of Jurisdictional Issues

In its report of February 2004, the Royal Society of Canada concluded:

> Provided an adequate regulatory regime is put in place, there are no science gaps that need to be filled before lifting the moratorium on oil and gas development.

The report continued:

> It is extremely important to recognize that this does not mean that science gaps do not exist (we have outlined many). Nor should it be taken to mean that the Panel is recommending that development be allowed to begin immediately. What it does mean is that, if the moratoria were lifted, regulation would be in place to ensure that these critical science gaps would be filled before development of an oil and gas industry in the QCB. We also note that lifting the moratoria would enhance the opportunities for filling many of the science gaps, through shared-cost partnerships involving industry participation.

The Nisga'a Nation is firmly of the view that before any decision to lift the moratorium can be taken, an adequate fiscal and regulatory regime in respect of future oil and gas exploration and development must first be established. The development of the regime in advance of the lifting of the moratorium would ensure that the essential legal and regulatory safeguards are in place before any resource activity would commence.

As a government with treaty interests at stake, Nisga'a Lisims Government must be directly involved in the design and development of an appropriate fiscal and regulatory regime for any future offshore oil and gas activities. The Nisga'a Nation has consistently

maintained that any regulatory regime must ensure that any future offshore resource development would take place in an environmentally safe and scientifically sound manner, having regard for the cumulative impacts of oil and gas development. Specific provision must be made to ensure that the appropriate safeguards are established to protect the Nass Area in the event of environmental degradation or catastrophe. The Nisga'a Nation has previously suggested that mitigation efforts include the requirement that before commencing work, a developer must post a bond sufficient to protect the Nass Area in the event of environmental degradation or catastrophe. Our participation would of course be responsible and positive, bearing in mind our responsibility to protect the interests of our people.

It is obvious that participation in such a large and important undertaking will require a level of resources that exceeds the means of the Nisga'a Nation. We look forward to discussing with Canada how the Nisga'a Nation might be provided with the financial means to undertake our appropriate role.

The Nisga'a Nation notes that jurisdictional issues regarding Queen Charlotte Sound, Dixon Entrance and Hecate Strait remain unresolved. The Nisga'a Nation, Canada, British Columbia and other First Nations all have claims to or interests in the living and non-living resources, subsoil and seabed in those areas. The Nisga'a Nation believes that the negotiation of a Federal-Provincial-Nisga'a Nation "Accord" would be a useful first step to resolving jurisdictional issues. Such an accord would provide the certainty that industry, governments and the Nisga'a Nation require to move forward with any consideration of potential future offshore development that might take place in or otherwise affect the Nass Area or our other Treaty interests.

The Nisga'a Nation also supports the creation of a Canada - British Columbia Offshore Petroleum Board to manage the oil and gas resources offshore of British Columbia provided that the board includes at least the degree of Nisga'a Nation representation provided for under paragraph 7 of the *Environmental Assessment and Protection* Chapter of the Nisga'a Treaty.

2. *Environmental Considerations*

a) The Nisga'a Nation and the Nass Area

(i) Geographic Setting

The Nass Area includes the entire Nass watershed and the marine waters commonly known as Portland Inlet, Observatory Inlet and Portland Canal. These lands are in the immediate vicinity of areas of proposed offshore oil and gas exploration and development and stand to be directly affected by any potential future exploration and development of these resources. [See map attached as Appendix "A"]

The Nass Area is rich in natural resources, both renewable and non renewable. The salmon resources of the Nass River are the third largest in the province after the Fraser and Skeena Rivers. Crab, halibut, shrimp, prawn, intertidal bivalves and other species are abundant in the Nass Area. The Nass River plays host to large numbers of birds and marine pinnipeds each spring. Oolichan is a vital part of Nisga'a culture and the Nass River oolichan run is the strongest on the coast of British Columbia.

(ii) Nisga'a Nation and Marine Economic Uses

The Nisga'a Nation is integrally linked to both marine and inland resources. We are a fishing society with significant economic, cultural and spiritual ties to these resources of the Nass Area. Our interests under the Nisga'a Treaty include allocations of and entitlements to many species that migrate or travel through Queen Charlotte Sound, Dixon Entrance and Hecate Strait. Nisga'a fishers are active in commercial, domestic, and recreational fisheries.

(iii) Nisga'a Nation and Marine Research

The Nisga'a Fisheries and Wildlife Program, established in 1992, has developed into a recognized first class fisheries program conducting critically important applied research and fisheries management throughout the Nass Area.

The Nass Fishwheel Program is instrumental to the successful management of all Nass River salmon fisheries. The Nisga'a catch monitoring programs provide accurate and reliable data on salmon and non-salmon harvests which are then used to account for treaty allocations of salmon.

Fisheries and Oceans Canada has contracted with the Nisga'a Fisheries and Wildlife Program for the provision of services such as commercial fishery patrols, escapement enumeration, and research on sockeye lakes within the Nass Area. The Nisga'a Fisheries and Wildlife Program has undertaken various marine studies including an intensive assessment of dungeness crab populations and harvests at the mouth of the Nass River and biological assessments of clam and cockle populations in the Nass Area.

The Nisga'a Fisheries and Wildlife Program also has a productive information sharing arrangement with the Alaska Fish and Game Department.

The Nisga'a Fisheries and Wildlife Program has a year-round staff of approximately 6 persons with seasonal employment growing to over 110 persons each summer. Approximately 250 to 300 people earn a livelihood from our seasonal commercial fishery and our growing recreational fishery. Nisga'a citizens continue to participate in our domestic fishery for their home use.

b) Nisga'a Nation's Position On Environmental Considerations

It is the Nisga'a Nation's view that the current federal review process (involving the reports of the Royal Society of Canada, the Priddle Panel, the First Nations Engagement Coordinator and this submission) has not been sufficient to comply with the environmental assessment requirements of the 1996 Cabinet Directive, revised in 1999.

The Terms of Reference for the Public Review of the British Columbia Offshore Oil and Gas Moratorium provide that "any future change by Cabinet to the existing west coast moratorium policy requires a Strategic Environmental Assessment, as a result of a Cabinet Directive in 1996, revised in 1999." As set out in that Cabinet Directive, certain matters must be included in a strategic environmental assessment, as follows:

> **Ministers expect the strategic environmental assessment to consider the scope and nature of the likely environmental effects, the need for mitigation to reduce or eliminate adverse effects, and the likely importance of any adverse environmental effects, taking mitigation into account**. The strategic environmental assessment should contribute to the development of policies, plans and programs on an equal basis with economic or social analysis; the level of effort in conducting the analysis of potential environmental considerations should be fully integrated into the analysis of each of the options developed for consideration, and the decision should incorporate the results of the strategic environmental assessment. Departments and agencies should use, to the fullest extent possible, existing mechanisms to involve the public, as appropriate. **Departments and agencies shall prepare a public statement of environmental effects when a detailed assessment of environmental effects has been conducted through a strategic environmental assessment. This will assure stakeholders and the public that environmental factors have been appropriately considered when decisions are made.**

It is the position of the Nisga'a Nation that before any decision to lift the moratorium can be made, proper environmental assessments must be established and carried out on the potential impacts of offshore oil and gas activities on the environment, on the future economic, social and cultural well-being of Nisga'a citizens and on the measures that can be taken to prevent or mitigate potential adverse impacts. In short, any future environmental assessment must specifically address the effect that any lifting of the

moratorium may have on our people, our lands, our Treaty interests, and our existing and future economic social and cultural well-being.

The Nisga'a Nation supports the implementation of genuine strategic environmental assessments while deliberations regarding the moratorium are being held. The assessments would be conducted for all stages of exploration and development including seismic exploration, drilling, production and transport.

The establishment and conduct of any assessments must, of course, be undertaken in a manner that conforms to the Nisga'a Treaty and the Nisga'a Nation must have an appropriate role in participating in and reviewing such assessments.

Specific attention must be paid to the *Environmental Assessment and Protection* Chapter of the Nisga'a Treaty. In particular, paragraph 8(e) provides that an environmental assessment process must assess whether the project can reasonably be expected to have adverse environmental effects on residents of Nisga'a Lands, Nisga'a Lands, or Nisga'a interests as set out in the Treaty and where appropriate, make recommendations to prevent or mitigate any such effects.

In addition, the strategic environmental assessment must assess the effects of a project on the existing and future economic, social and cultural well-being of Nisga'a citizens who may be affected by the project (see para. 8(f)).

Nisga'a citizens must be kept informed of the assessment process and all information relevant to any potential future exploration and development must be effectively communicated to Nisga'a citizens.

In addition to the matters set out in the quote from the Cabinet Directive set out above, we suggest that the strategic environmental assessments should focus on the following:

(i) identifying marine protected areas and sensitive zones;
(ii) collecting baseline data; and
(iii) developing a "best practices" marine environmental assessment framework.

(i) Marine Protected Areas and Sensitive Zones

The Nisga'a Nation supports the creation of marine protected areas and the designation of sensitive zones to protect important and sensitive ecosystems from potential damage. We look forward to assisting Canada and British Columbia in identifying these areas and determining how they can be best protected as they are relevant to our interests under the Nisga'a Treaty. Potential protected or sensitive areas include the Hecate Strait sponge reefs, intertidal shorelines, estuaries, seamounts, and high use fishing areas.

(ii) Baseline Data

The Royal Society of Canada concluded that regulations should be put in place to ensure that critical science gaps would be filled before oil and gas development occurs.

One of the main areas in respect of which serious science gaps need to be filled is in respect of baseline data for marine resources of the Queen Charlotte Basin. The Nisga'a Fisheries and Wildlife Program is well positioned to assist in gathering the baseline data essential for a full and proper environmental assessment. The Nisga'a Nation has, by letter dated April 30, 2004, a copy of which is attached as Appendix "B", proposed that a number of studies be undertaken to acquire the necessary baseline data for a number of marine resources that are the subject of Nisga'a interests under the Nisga'a Treaty.

The baseline studies suggested by the Nisga'a Nation would define species distributions, seasonal occurrences, and critical habitat and would include strategic cause and effect

studies to address significant gaps in knowledge with respect to potential negative effects of oil and gas activities on valued ecosystem components.

The gathering of baseline data and the undertaking of cause and effect studies in the manner we suggest is of vital importance not only to the Nisga'a Nation and our interests under the Treaty but to Canadians generally.

(iii) Marine Environmental Assessment Framework

The Nisga'a Nation encourages Canada to establish a Marine Environmental Assessment Framework which would include the following:

1. establishment of a set of guidelines for environmental review and cumulative effects assessment in the offshore;
2. establishment of a regional process for the Nisga'a Nation, local, provincial and federal governments, and any oil and gas proponents to update environmental data;
3. design of a "one window" environmental review framework that provides for independent screening and evaluation;
4. development of a list of species of importance to the Nisga'a Nation;
5. development of a sensitive ecosystem mapping system for oil spill response;
6. conduct of critical habitat mapping and identification of environmentally sensitive areas;
7. development of monitoring and mitigation strategies;
8. adoption of standards for the protection of cultural sites;
9. development of a plan for cumulative effects assessment;
10. development of a process for applying Nisga'a Nation traditional knowledge;
11. establishment of opportunities for the Nisga'a Nation and its citizens in assessment, monitoring, and mitigation; and
12. establishment of increased capacity for Nisga'a Nation resource managers to participate in environmental assessments.

3. Socio-Economic Considerations

The Nisga'a Nation is committed to ensuring that the Nisga'a Nation and its citizens share in any economic benefits that may arise from any future offshore oil and gas activities.

Opportunities for Nisga'a citizens should be made available through:

- providing employment and training opportunities;
- ensuring Nisga'a cultural sites and artifacts are identified and protected so that Nisga'a citizens can continue to carry out their cultural traditions without impact;
- ensuring businesses in northern British Columbia are provided a fair and competitive opportunity to supply goods and services; and
- developing agreements between industry and the Nisga'a Nation to provide economic opportunities to the Nisga'a Nation and Nisga'a citizens in each stage of development, from planning and maintenance to decommissioning. The Nisga'a Nation could participate with industry as partners in joint ventures, strategic alliances, and through equity participation and ensuring the Nisga'a Nation is consulted on work plans and infrastructure development.

Moreover, there is a need for the Nisga'a Nation, Nisga'a citizens, governments, and industry proponents to begin to build relationships through participating in pre-planning discussions concerning offshore oil and gas development.

D. Key Points

- The Nisga'a Nation's role in the ongoing deliberations as to whether to lift the offshore oil and gas moratorium and its expectations of the process is unique.

Unlike other First Nations in the area, the Nisga'a Nation's participation is defined by and must be consistent with the Nisga'a Treaty, a treaty and land claims agreement within the meaning of s. 35 of the *Constitution Act, 1982*. The Nisga'a Treaty sets out the rights of the Nisga'a Nation where our people, our lands or our interests under the Treaty may be reasonably expected to be adversely affected by a project.

- Any steps taken by the Government of Canada in considering whether to lift the moratorium or in implementing future offshore oil and gas development in British Columbia must be taken in accordance with the Nisga'a Treaty.

- Before any decision to lift the moratorium is taken:

    a) an adequate fiscal and regulatory regime must be established and the Nisga'a Nation must be directly involved in the design and development of the regime, and

    b) proper environmental assessments for all stages of exploration and development must be conducted with the Nisga'a Nation taking an active role in accordance with the Nisga'a Treaty.

- the fiscal and regulatory regime and the environmental assessments must address the potential impacts of offshore oil and gas activities on the environment, on the future economic, social and cultural well-being of Nisga'a citizens and on the measures that can be taken to protect the Nass Area and to prevent or mitigate potential adverse impacts.

- The Nisga'a Nation and its citizens must be kept fully informed about and share in any economic benefits that may arise as a result of any potential future exploration and development of offshore oil and gas.